Supreme Court, U.S.
FILED

98 1852 MAR 15 1999

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1998

JACK R. FINNEGAN,

Petitioner,

v.

MONTE KRUSE & KEN M. BENSWORTH, DOES 1 - 20, inclusive,

Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JACK R. FINNEGAN,
Counsel of Record in pro se
12575 Catalina Drive
Santa Ana, CA 92705
714-544-3247

46pp

QUESTIONS PRESENTED

1. Can anyone possibly say, that purposely attempting to destroy the rights of plaintiff or destroying plaintiff's case in a courthouse is not an attack on our system of law, when the Eleventh Amendment stands that there must be a real dispute involving real parties for district court to have subject matter jurisdiction, with regard to the substitution of defendant?

2. When a case has been removed and the defendants then seeks to substitute a party who would destroy diversity, should the 9th Circuit have completely different requirements when a set of procedural issues arises under Subdivision (e), new in §1447, which addresses the subject, giving the court only two options: (1) deny the motion, or (2) grant it and remand the case?

3. Is it reversible error to be denied the rights of due process, and equal protection of the laws under California State Constitution Article 1, Section 7(a), and United States Constitution, 5th Amendment by the denial of the fundamental right to produce and present relevant evidence?

4. Should the 9th Circuit be indifferent to the principles and precedents applied by the 1st, 2nd, 4th, 5th, 8th and 10th Circuits, pursuant to Title 28, Section 1442(a)(1)?

5. Does Title 28, Section 1442(a)(1) only in the 9th Circuit shield the ministerial tort acts of government employees and allow immunity protection, regardless of the act of defendants?

6. Does Title 28, Section 1442(a)(1) only in the 9th Circuit grant the right to remove a case when direct averments are alleged to be false and are not well grounded in fact and warranted by law; when the application of Section 1442(a)(1) in the other Circuits is; such fact must affirmatively appear, not alone by a broad statement in the petition for removal to that effect, but by direct averments that must exclude the possibility that any alleged act was not justified by defendants' federal duty?

7. If plaintiff contests defendant's assertion for removal by motion to remand alleging that defendant was not acting under color of office, must district court hold a hearing to determine the facts necessary to vest jurisdiction in federal court as held by the other Circuits?

8. Should the 9th Circuit apply different requirements than the other circuits to Title 28, Section 1446, for removal of cases that are to be strictly construed, and where it is essential for removal that a proper allegation of fact be set forth in the petition which is then to be strictly construed?

9. Where Title 28, 1447(e) states: "If it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case. "Shall" is the verb used; the matter is not discretionary; should the 9th Circuit where a motion to remand was valid, in a mere private case between the parties, where the plaintiff's right to remand became mature and unconditional, allow the change in the law that would utterly deprive plaintiff of his right to remand and thus work an injustice?

10. Did the 9th Circuit ignore established principle and precedent that motion for remand effectively forces party who invoked federal court's removal jurisdiction to prove whatever is necessary to support petition, e.g., existence of diversity, amount in controversy, or federal nature of claim?

11. Did the 9th Circuit ignore established principle and precedent that the removing party bears the burden of establishing district court's jurisdiction and subject matter jurisdiction upon a motion to remand for lack of such jurisdiction and if doubts remain as to the right of removal, the case should be remanded?

12. Did the 9th Circuit ignore established principle and precedent that when district court lacks jurisdiction over any claim in action removed from state court, court's removal jurisdiction over entire action is defeated, thus warranting remand of entire case?

13. Did the 9th Circuit ignore established principle and precedent that it would be improper for district court to address motion to dismiss if court lacks subject matter jurisdiction?

14. Did the 9th Circuit ignore established principle and precedent if case is improperly removed because original jurisdiction was lacking that the case must be remanded to state court from which it was removed and the case must be remanded as first order of business where state court has jurisdiction but federal court lacks both original and removal jurisdiction?

15. Did the 9th Circuit ignore established principle and precedent that case was improperly removed from state court where state law was controlling in either state or federal court as to any allegations of tortuous acts and where federal remedies were not exclusive in that they were only in addition to state remedies and were not preventative of plaintiffs' pleading only state causes of action and recovering only under measure of damages provided by state law?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED - - -	I
TABLE OF CONTENTS - - -	iv
TABLE OF CITED AUTHORITIES - -	vi
OPINIONS BELOW - - - -	1
STATEMENT OF JURISDICTION - -	1
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED -	1
STATEMENT OF THE CASE - - -	3
History of Litigation - - -	3
Federal Questions - - -	10
BASIS FOR FEDERAL JURISDICTION IN THE COURT IN THE FIRST INSTANCE -	22
REASONS FOR GRANTING THE WRIT -	22

I. THE PETITION SHOULD BE GRANTED BECAUSE OF THE MANY DECISIONS WHICH CONFLICT BETWEEN THE MEMORANDUM BELOW AND OTHER CIRCUIT COURT DECISIONS REGARDING FEDERAL REMOVAL STATUTE.

II. THE PETITION SHOULD BE GRANTED BECAUSE THIS CASE PRESENTS THE IMPORTANT ISSUE OF. EQUAL JUSTICE UNDER THE LAW BEING DENIED AND

BECAUSE A MOST BASIC RIGHT, THE RIGHT TO OBTAIN JUSTICE ARISING FROM CERTAIN REMEDY IN THE LAWS FOR ALL INJURIES OR WRONGS.

SUMMARY OF ARGUMENT - - - 22

ARGUMENT

I. CONSTITUTIONAL ISSUES- - 22

II. REMOVAL STATUTE - - 23

CONCLUSION- - - - - 24

TABLE OF CITED AUTHORITIES

Supreme Court Cases: *Page*

International Primate Protection League v. Administrators of Tulane Educational Fund, U.S.La.1991, 111 S.Ct. 1700, 500U.S. 72, 114 L.Ed.2d 134, - - - - - 19

Mesa v. California, U.S.Cal.1989, 109 S.Ct. 959, 489 U.S. 121, 103 L.Ed.2d 99 - - 12

O'Bryan v. Chandler, W.D.Okla.1973, 356 F.Supp. 714,affirmed 496 F.2d 403, certiorari denied 95 S.Ct. 245, 419 U.S. 986, 42 L.Ed.2d 194, rehearing denied 95 S.Ct. 838, 420 U.S. 913, 42 L.Ed.2d 845 - - - - 11, 12

Westfall V. Erwin 1988, 484 U.S. 292, 98 L Ed 2d 619, 108 S.Ct. 580. - - - 24

Willingham v. Morgan, U.S.Kan.1969, 89 S.Ct. 1813, 395 U.S. 402, 23 L.Ed.2d 396, on remand 424 F.2d 200. - - - - 12, 15

Certiorari Denied And Appeal Dismissed Cases:

In re Carter, C.A.5 (Ga.) 1980, 618 F.2d 1093, certiorari denied 101 S.Ct. 1410, 450 U.S. 949, 67 L.Ed.2d 378. - - - - 13

Evans-Hailey Co. v. Crane Co., M.D.Tenn 1962, 207 F.Supp. 193, appeal dismissed 86 S.Ct. 10, 382 U.S. 801, 15 L.Ed.2d 55. - 16

Sweeney v. Westvaco Co., C.A.1 (Mass.) 1991, 926 F.2d 29, certiorari denied 112 S.Ct. 274, 502 U.S. 899, 116 L.Ed.2d 226. - - 21

Page

Circuit Court Cases:

Bear River Drainage District, C.A.10 (Utah) 1959, 267 F.2d 849. - - - 18

Belser v. St. Paul Fire and Marine Ins. Co., C.A.5 (La.) 1992, 965 F.2d 5. - - 18

Bor-Son Bldg. Corp. v. Heller, C.A.8 (Minn.) 1978, 572 F.2d 174. - - - 13

Brown v. City of Meridian, C.A.5 (Miss.) 1966, 356 F.2d 602. - - - - 13

In re Business Men's Assur. Co. of America, C.A.8 (Mo.) 1993, 992 F.2d 181. - - 19

Encoder Communications, Inc. v. Telegen, Inc., C.A.2 (N.Y.) 1981, 654 F.2d 198. - - 21

Financial Timing Publications, Inc. v. Compugraphic Corp., C.A.8 (Minn.) 1990, 893 F.2d 936. - - - - 11

First Nat. Bank of Salem v. Wright, C.A.8 (Mo.) 1985, 775 F.2d 245 - - - 20

Libhart v. Santa Monica Dairy Co., C.A.9 (Cal.) 1979, 592 F.2d 1062. - - - 11

Roach v. West Virginia Regional Jail and Correctional Facility Authority, C.A.4 (W.Va.) 1996, 74 F.3d 46. - - - - *Page* 23

Shell Oil Co., C.A.5 (Tex.) 1991, 932 F.2d 1523, rehearing denied 940 F.2d 1532. - 18

Warren G. Kleban Engineering Corp. v. Caldwell, C.A.5 (Miss.) 1974, 490 F.2d 800. - - 21

United States Constitution Citations:

Article III, Section 2 - - - 1
Article IV, Section 1 - - - 2
Article IV, Section 2 - - - 2
V Amendment, Section 1 - - - 2
XI Amendment - - - - - 2

California Constitution Article 1, Section 1 2
California Constitution Article 1, Section 7(a) 3
California Constitution Article 1, Section 7(b) 3

Statutes:

Title 28, 144 - - - - - 8
Title 28, 1367 - - - - - 16
Title 28, 1367(c)(3) - - - 17
Title 28, 1442(a)(1) - - - passim
Title 28, 1446 - - - 17, 18
Title 28, 1447 - - - 17
Title 28, 1447(e) - - - 17

Federal Rules Of Civil Procedure: *Page*

Rule 8(a) - - - - 10
Rule 11 - - - 5, 7, 10
Rule 65(b) -- - - 7

Internal Revenue Code:

6511(A) - - - 4

APPENDIX

APPENDIX A — Judgement of the United States Court of Appeals for the Ninth Circuit, on Re-hearing and Suggestion for rehearing en banc, decided December 17, 1999. 1a

APPENDIX B — Opinion of the United States Court of Appeals for the Ninth Circuit, on Re-hearing and Suggestion for rehearing en banc, decided September 22, 1998. 2a

APPENDIX C — Order of the United States District Court for the Central District of California (Santa Ana), decided October 6, 1997. 5a

APPENDIX D — Order of the United States District Court for the Central District of California (Santa Ana), decided October 3, 1997. 10a

The petitioner Jack R. Finnegan respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for rehearing with suggestion for rehearing en banc for the Ninth Circuit was not published and is reproduced below in the Appendix to this Petition as Appendix ("App.") A, at 1a. The opinion of the United States Court of Appeals for the Ninth Circuit was not published and is reproduced below as App. B, at 2a. The Decision and Order of the United States District Court for the Central District of California, Southern Division, Gary L. Taylor, is unreported and is reproduced below as App. C at 5a. The district court's Decision and Order on plaintiff's motion for recuse from, Alicemarie H. Stotler is unreported and is reproduced below as App. D at 10a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") was entered on September 22, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C.S. § 1254(l) (1988).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

ARTICLE III, provides in pertinent part:

Section 2. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, and Laws of the United States;...

ARTICLE IV, provides in pertinent part:

Section 1. Full Faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Section 2. [1] The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

AMENDMENTS TO THE UNITED STATES CONSTITUTION

ARTICLE V, Section I, provides in pertinent part:

...nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

CALIFORNIA CONSTITUTION

ARTICLE I, Section 1

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

ARTICLE I, Section 7(a)

A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution...

ARTICLE I, Section 7(b)

A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens.

STATUTES

Because the statutory provisions involved in this matter are lengthy, only the immediately pertinent portions of statutes have been set out in this Petition. These statutory provisions include:

28 U.S.C.S. § 1367 (Law. Supplemental Jurisdiction. 1990).

28 U.S.C.S. § 1441 (Law. District Courts, Removal 1990).

28 U.S.C.S. § 1442 (Law. Federal officers sued 1948).

28 U.S.C.S. § 1446 (Law. Procedure for removal 1991).

28 U.S.C.S. § 1447 (Law. Procedure after removal 1991).

STATEMENT OF THE CASE

HISTORY OF THE LITIGATION

As stated by Max Lerner, "Principles—and I have in mind such principles as states' rights or national sovereignty or the free

market or pacifism— have a way of drying up while the sap of life goes flowing in another direction." This case is about significant legal principles.

This lawsuit began as a direct result of professional tax advice to petitioner (hereinafter FINNEGAN) from petitioner's tax accountant for the tax year 1991. In addition to this professional advice, a letter from Merrill Lynch recommending amending FINNEGAN'S 1991 tax return because Merrill's statutory required accounting methods differed from FINNEGAN'S. Finally because of an error discovered in the transferring of deductions from page two of Schedule E, to page one of that schedule resulting in the loss of a legitimate deduction for the tax year 1991.

On or about August 2, 1992, respondent KRUSE, requested from the Fresno office of Internal Revenue Service a copy of FINNEGAN'S 1991 tax return for the sole purpose of harassment for retribution for filing an administrative appeal, violating IRS regulations by auditing two consecutive years returns of the same taxpayer without an intervening audit by another auditor. A ministerial act alleged to constitute Negligence.

On or about August 16, 1992, FINNEGAN timely filed his 1991 original tax return, fifteen days after the improper request for FINNEGAN'S tax return by respondent KRUSE confirming the ministerial act described above.

On or about January 3, 1994, FINNEGAN filed a timely amended tax return as was his right provided by Section 6511(a) of the Internal Revenue Code.

Chief Justice Earl Warren said it best. "Citizenship is man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen."

On or about March 3, 1994, KRUSE lied to FINNEGAN about his request for obtaining FINNEGAN'S 1991 tax return in a letter dated. March 3, 1994, alleged to constitute Fraud and Deceit,

(Exhibit 5). Exhibits herein referred to are Exhibits attached to FINNEGAN'S "Rule 11 Motion" (District Court's Record #8) and Excerpts to Brief of Appellant filed with Ninth Circuit.

On or about June 29, 1994, respondent KRUSE determined a partial refund to taxpayer FINNEGAN, and closed the audit for the 1991 year. A letter from the IRS District Director confirming this determination was mailed to FINNEGAN on June 29, 1994. (Exhibit 2), above.

On or about July 25, 1994, this determination and the amount of refund was confirmed in an accounting statement from the IRS dated July 25, 1994, and stating this amount would be refunded to FINNEGAN. (Exhibit 1), above. The amount was never refunded.

On or about September 28, 1994, an attempt at re-examination of the same 1991 tax year, was conducted by respondent BENSWORTH constituting repetitive audits in violation of IRS Notice 782. Respondent BENSWORTH did not produce the required letter of authorization from the Commissioner of Internal Revenue Service as required by IRS regulations for a re-examination of the same tax year a ministerial act alleged to constitute Negligence. Respondent BENSWORTH then subsequently stopped payment of the already authorized payment of refund, a ministerial act alleged to constitute Conversion. Respondent BENSWORTH then subsequently disallowed the approved refund a ministerial act alleged to constitute Fraud and Deceit. Respondent BENSWORTH then subsequently issued an invalid deficiency notice, in violation of IRS regulations, a ministerial act alleged to constitute Negligence, Fraud and Deceit and Conversion. Respondent BENSWORTH then subsequently lied about FINNEGAN not producing required tax records already in possession of the IRS numbering approximately 500 documents, an act alleged to constitute Fraud and Deceit, and in violation of IRS regulations of requests for re-submittal of already submitted documents. A reminder of Montesquieu warning, "The corruption of every government begins nearly always with that of principles".

On or about June 3, 1997, FINNEGAN filed a timely

Complaint in Superior Court of the State of California, for Orange County, naming respondents KRUSE and BENSWORTH and DOES 1 through 20 Inclusive as defendants in a state civil tort action for Fraud, Negligence, Conspiracy, Conversion, and Intentional Infliction of Emotional Distress.

The plaintiff and defendants were all residences of Orange County, State of California. The lawsuit included all the necessary elements, specifically naming the statutes involved and what the identification of those statutes alleged to be violated. The lawsuit named the dates of the circumstances, what the actions of the defendants were that plaintiff felt entitled to sue those persons and bring them to court and ask for damages.

On or about June 20, 1997, KRUSE and BENSWORTH were served by personal service.

Defendants did not answer this suit. They did not assert a variety of different and often contradictory things, permissible under or law to do.

The defendants did not come in and file an answer that said, it didn't happen, we didn't do it, somebody else did it, you weren't hurt, you're not hurt as bad as you say you were, and besides we weren't there. Instead they petitioned the federal district court to remove the case from state court, which is their right under our law.

On or about July 9, 1997, defendants filed with district court Notice of Removal under 28 U.S.C. §1442(a)(1), CR #1. Defendants did not have a right to lie to the court and misrepresent the facts and the law of the case so that they could hide from their ministerial acts and personal accountability.

On or about July 18, 1997, FINNEGAN filed Objection to Motion for Removal under 28 U.S.C. §1442(a)(1), CR #2.

On or about August 7, 1997, FINNEGAN filed Motion to Remand action back to state court, CR #3.

On or about August 13, 1997, defendants filed Opposition to Motion to Remand. The opposition did not address the Notice's lack of well grounded fact and law showing removability, CR #4.

On or about August 15, 1997, FINNEGAN filed Notice of Motion for Preliminary Injunction, seeking to protect evidence, CR #5.

On or about August 25, 1997, district court denied FINNEGAN'S Motion to Remand, without a hearing to ascertain facts of case, citing Arizona v. Manypenny, 451 U.S. 232, 241-242 (1981), a criminal case, CR #6.

On or about September 3, 1997, FINNEGAN filed Motion for Reconsideration for Remand to state court, CR #7.

On or about September 3, 1997, FINNEGAN filed Rule 11 Motion for Corrections of Notice of Removal, CR #8.

On or about September 3, 1997, FINNEGAN filed Demand for Jury trial, CR #9.

On or about September 5, 1997, a Friday, district court on its own Motion CONTINUES Preliminary Injunction for the sole benefit of defendants, in violation of Federal Rules of Civil Procedure 65(b), CR #10.

On or about September 8, 1997, defendants filed Notice of Motion to Substitute the United States as defendant and to Dismiss, dated Saturday September 6, 1997, CR #11.

On or about September 8, 1997, defendants filed Opposition to Preliminary Injunction dated Saturday, September 6, 1997, Cr #12.

On or about September 10, 1997, defendants filed Opposition to Motion for Reconsideration, CR #13.

On or about September 19, 1997, FINNEGAN filed Withdrawal of Application for Preliminary Injunction, CR #14.

On or about September 19, 1997, FINNEGAN filed Affidavit for recusal for bias and prejudice under 28 U.S.C. §144, CR #15.

On or about September 19, 1997, FINNEGAN filed Opposition to Substitute the United States as defendant and to Dismiss, CR #16.

On or about September 23, 1997, district court's Minute Order to STAY PROCEEDINGS regarding 28 U.S.C. §144, Motion to Recuse, CR #17.

On or about September 25, 1997, FINNEGAN filed Motion to Extend Time, because of unusual procedural aspects present in case. This motion was never ruled on by District Court.

On or about October 2, 1997, district court Ordered Referral of Motion to Recuse sitting judge regarding 28 U.S.C. §144, CR #18.

On or about October 2, 1997, district court clerk's Referral of Motion to Recuse Judge regarding 28 U.S.C. §144, CR #19.

On or about October 3, 1997, District Court Judge Alicemarie H. Stotler's Order Denying Motion to Disqualify Judge, even though Judge Stotler found motion for Preliminary Injunction was improperly continued, page 2, line 19, of Order, CR #20, App "D" 10a.

A refection here on the observation of Walter Savage Landor, "Principles do not mainly influence even the principled; we talk on principle; but we act on interest"; and the related words of John F. Kennedy, "In America there must be only citizens, not divided by grade, first and second, but citizens, east, west, north, and south".

On or about October 6, 1997, district court's Order Granting Motion to Substitute Defendants and Granting of Motion to Dismiss, CR #22, App "C" 5a.

On or about November 3, 1997, FINNEGAN filed a Notice of Appeal CR #23.

On or about November 13, 1997, FINNEGAN filed a Representation Statement.

On or about November 13, 1997, FINNEGAN filed a Certification of Record.

On or about December 4, 1997, FINNEGAN filed a Statement of Proceedings.

On or about February 18, 1998, FINNEGAN filed an Opening Brief with the Ninth Circuit Court of Appeals.

On or about March 18, 1998, defendants filed a Response Brief with the Ninth Circuit Court of Appeals.

On or about March 31, 1998, FINNEGAN filed a Reply Brief with the Ninth Circuit Court of Appeals.

On or about September 22, 1998, the Ninth Circuit Court of Appeals filed a Memorandum affirming the district court's order, App "B" 2a.

On or about October 6, 1998, FINNEGAN filed a Petition for Rehearing and Suggestion for Rehearing En Banc, with the Ninth Circuit Court of Appeals.

On or about December 17, 1998, the panel of the Ninth Circuit Court of Appeals filed an Order denying appellant's petition for rehearing and to reject the suggestion for hearing en banc, App "A" 1a.

This was never a case about federal sovereign immunity; it is a case about the constitutional issue of due process, and the denying any person within its jurisdiction equal protection under the laws, and California State sovereign rights. This case turns on an improper petition for removal and the lower court's errors after removal.

FEDERAL QUESTIONS

The federal question of Constitutional right of due process, equal protection under the laws, and jurisdiction sought to be reviewed was first raised in the Notice of Removal filed under 1442(a)(1), CR #1. The district court allowed the notice, that was opposed by plaintiff CR #2 and A Motion to Remand, CR #3. No hearing was held to determine the issues. The Ninth Circuit affirmed the lower court's action.

The requirement that a verified petition be part of the removal papers was eliminated by Congress see House Report 100-889, August 26, 1988, and in its place subdivision (a) now requires a "notice of removal signed pursuant to Rule 11". Rule 11 of the Federal Rules of Civil Procedure authorizes sanctions for a paper whose averments are not "well grounded in fact and ... warranted by ... law". Congress deemed the sanctions authorized by Rule 11 were an adequate remedy for a false statement made in removal papers.

The requirement that the petition state "the facts" that justify removal was replaced with language borrowed from the general pleading mandate of Rule 8(a) of the Federal Rules of Civil Procedure. The requirement of subdivision (a) is now that the notice contain "a short and plain statement of the grounds for removal". This should only be taken to mean that no change of substance is intended and that the gist of what the new "notice" has to include is in any event no greater than what the old "petition" had to include.

On or about July 18, 1997, FINNEGAN filed an Objection to Removal, and on or about September 3, 1997, FINNEGAN filed a Rule 11 Motion. Both filings were based on misrepresentations; alleging that defendants, federal government employees, acted under color of office in performing complained of actions. FINNEGAN asserted that the defendants acted outside the bounds of their authority in doing the ministerial acts complained of and were in violation of California State tort laws.

FINNEGAN did not fail to object, and FINNEGAN'S objection is supported in both the Eighth Circuit by Financial Timing Publications, Inc. v. Compugraphic Corp., C.A.8 (Minn.) 1990, 893 F.2d 936; and the Ninth Circuit by Libhart v. Santa Monica Dairy Co., C.A.9 (Cal.) 1979, 592 F.2d 1062.

It is established if plaintiff takes issue with statements in removal petition, issue must be heard and determined by district court, but if plaintiff does not take issue with what is stated in petition, he must be taken as assenting to its truth and petitioning defendant need not produce any proof to sustain it.

> As William Hazlitt remarked "General principles are not the less true or important because from their nature they elude immediate observations; they are like the air, which is not the less necessary because we neither see nor feel it."

It is established law in the three cases cited below that the application of Section 1442(a)(1) is limited to those acts done by such employees "under color of such office", and such fact must affirmatively appear, not alone by a broad statement in the petition for removal to that effect, but by direct averments which must exclude the possibility that any of their alleged acts was not justified by their federal duty.

The Court in O'Bryan v. Chandler W.D.Okla.1973, 356 F.Supp. 714, affirmed 496 F.2d 403, certiorari denied 95 S.Ct. 245, 419 U.S. 986, 42 L.Ed.2d 194, rehearing denied 95 S.Ct. 838, 420 U.S. 913, 42 L.Ed.2d 845, held: "If plaintiff contests, by motion to remand, defendant's assertion in petition for removal that defendant was acting under color of office, district court must hold a hearing to determine the jurisdictional issues".

Where petition for removal stated that suit was in fact against employees of United States for acts under color of such office, and when pleadings were examined, it became apparent that plaintiff complained of ministerial acts taken by federal employees were

not in connection with their official duties, case should have been remanded.

Also in O'Bryan v. Chandler, the Court held: "Section 1442(a)(1), grants a federal officer who certifies under oath that he was acting 'under color of office or in performance of his duties,' the right to remove a case filed against him to federal court for trial on the merits in the federal forum and invests the federal court with jurisdiction to hear and determine such an action as a matter of public policy".

In Willingham v. Morgan, U.S.Kan.1969, 89 S.Ct. 1813, 395 U.S. 402, 23 L.Ed.2d 396, on remand 424 F.2d 200 this Court ruled a slightly different version of 1442(a)(1) when it stated:

> "Under this section right of removal is absolute whenever suit in state court is for any act under color of federal office, regardless of whether suit could originally have been brought in federal court; and federal jurisdiction rests on federal interest in enforcement of federal law through federal officials."

The Ninth Circuit appears to be alone in its interpretation In Mesa v. California, U.S.Cal.1989, 109 S.Ct. 959, 489 U.S. 121, 103 L.Ed.2d 99.

The interpretation of the other Circuits is more in keeping with the Supreme Court's ruling on this case.

This Court ruled: "The federal officer removal statute is a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases which a federal officer is a defendant; it cannot independently support Article III "arising under" jurisdiction; rather, it is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action against the officer arises for Article III purposes.

In Mesa, this court also held that: "The statutory phrase "in the performance of his duties" in section that permits removal of actions or prosecutions against federal court officers "for any act under color of office or in the performance of his duties" does not mean something besides "under color of office" so as to permit removal of any actions or prosecutions brought against a federal officer for acts done during the performance of his duties regardless of whether that officer raises a federal defense. Congress meant by both expressions to preserve the preexisting requirement of a federal defense for removal."

The Fifth Circuit held in Brown v. City of Meridian, C.A.5 (Miss.) 1966, 356 F.2d 602, "A removal petition is basis for federal court jurisdiction and is the pleading of facts necessary to vest jurisdiction in federal court". In re Carter, C.A.5 (Ga.) 1980, 618 F.2d 1093, certiorari denied 101 S.Ct. 1410, 450 U.S. 949, 67 L.Ed.2d 378; "Whether subject matter jurisdiction exists is question to be answered by looking to complaint as it existed at time petition for removal was filed".

The Eighth Circuit held: "When defendant removes action to federal court, defendant has burden of showing that federal court has jurisdiction and, if no such showing is made, and if state court from which removal was had did have jurisdiction, proper course is remand, not dismissal". Bor-Son Bldg. Corp. v. Heller, C.A.8 (Minn.) 1978, 572 F.2d 174.

It is well established law that the application of Section 1442(a)(1), is that: To obtain removal under federal officer removal statute, defendant must have been acting at direction of "any officer of the United States or any agency thereof," defendant acting at direction of such officer must be "person" as envisioned by statute, defendant engaging in conduct must do so "acting under" direction of officer of United States or agency thereof, and defendant must have colorable federal defense. FINNEGAN established in his complaint that KRUSE and BENSWORTH were "Persons" under the statute. FINNEGAN also established that the

committing of tortuous acts could not under the law be acts covered by a colorable federal defense.

It is well established law that the application of Section 1442(a)(1), that: No precise standard exists as to the extent of control necessary to bring an individual within the "acting under" clause of this section relating to the removal to federal district court of a civil action or criminal prosecution commenced in a state court against an officer of the United States or any agency thereof; rather, the court in each case must ascertain to what extent defendants acted under federal direction and to what extent as independent agents.

It is well established law that the application of Section 1442(a)(1), that: To successfully remove case under federal officer removal statute, defendants must show that (1) they are "persons" within meaning of statute; (2) they were acting under color of federal authority when committed acts leading to instant lawsuit; and (3) they have colorable federal defense.

It is also well established law that the application of Section 1442(a)(1), that: Federal officer removal statute is satisfied if moving party can demonstrate that it acted under direction of federal officer, raise federal defense to plaintiff's claims, and demonstrate causal nexus between plaintiff's claims and acts it performed under color of federal office, for any act under color of office, case must be against federal actor for conduct under color of his or her office, and actor must raise colorable federal defense.

Defendants, as removing parties, must carry burden of proving grounds for removal, especially where plaintiff strenuously argue that defendants are not relying on any federal substantive right and no reference to a federal provision is made in plaintiff's complaint.

The Burden is upon party seeking to remove case to federal court and the presumptions all favor remand to court in which action was originally filed. When confronted with motion to remand removed action, removing party has burden of establishing

propriety of removal and establishing right to removal, and that extends not only to demonstrating jurisdictional basis for removal, but also including compliance with requirements of removal statute. Defendant seeking to invoke jurisdiction of federal court by way of removal, has burden of establishing that action arises under federal law.

When a motion to remand is timely filed, burden of persuasion rests upon removing party to show that action was duly removed, and any substantial doubts as to propriety of removal must be resolved against proponents of federal forum; thus, district court, in challenged case, may retain jurisdiction only where its authority to do so is clear, as any other holding would detract from principles of federalism, comity, and sovereignty of several states.

The proper action for federal court to take when it is determined that a case which has been removed to federal court was not properly removable is to remand the case to the state court, not to dismiss.

It was held in Willingham v. Morgan, U.S.Kan.1969, 89 S.Ct. 1813, 395 U.S. 402, 23 L.Ed.2d 396, on remand 424 F.2d 200 that:

> "Requirements that petition for removal of case to federal court contained short and plain statement of facts justifying removal and that person seeking benefit of removal provisions should be candid, specific and positive in explaining relation to transaction giving rise to suit must be tailored to fit facts of each case". It has always been essential to removal of case from state court that a proper allegation of fact be set forth in the removal petition to bring it within the terms of the removal statute. A petition for removal from state to federal court must contain averments well grounded in fact and law showing removability, and no averment essential to jurisdiction should be omitted. Requirements of Section 1446, for removal of cases are to be strictly construed, and it is essential for removal that a proper allegation of fact be set forth in the petition which is to be strictly construed".

It was held in Evans-Hailey Co. v. Crane Co., M.D.Tenn.1962, 207 F.Supp. 193, appeal dismissed 86 S.Ct. 10, 382 U.S. 801, 15 L.Ed.2d 55, "The test of sufficiency of a removal petition should be whether the varied jurisdictional allegations of the petition are sufficiently specific and detailed to disclose without material ambiguity that the case falls within limitation set by pertinent statutory provisions. For purposes of a removal petition, the facts giving rise to federal jurisdiction must be strictly construed and alleged with particularity. Party seeking removal of case to federal court must specifically allege facts upon which jurisdiction of federal court depends".

The doctrine of "pendent" jurisdiction applies in this case, in which the California State and federal claims arising out of the same event are joined. The defendants, not FINNEGAN elected to interject into this case and unfounded substitution of the United States as a defendant. The doctrine of pendent and ancillary jurisdiction, were codified in 1990 as "Supplemental Jurisdiction" with the addition of §1367 to Title 28.

The "ancillary" jurisdiction doctrine is applicable because FINNEGAN'S claim satisfies the diversity and monetary requirements, but defendants interposing substitution of defendants does not. The doctrine applies to sustain federal jurisdiction of a claim interposed by defendants by way of third-party claim even if the claim measured by it has no subject matter basis as applied to the Eleventh Amendment, as long as it is related to the main claim. The relatedness of this claim to the main claim permits the court to use the main claim as a kind of jurisdictional crutch the claims are deemed "ancillary" to the main claim under the §1367 codification.

In this case involving the supplemental jurisdiction doctrine, something happened to the "crutch" during the course of the action. The claim that satisfies federal jurisdiction was dismissed, leaving the "pendent" state claim without its jurisdictional host, while the other claim by the defendant that had depended on "ancillary" jurisdiction remained. The court was left with an objection of subject matter jurisdiction, an objection that would

knock everything out, the crutch as well as the claims that lean on it. Case law has left it largely in the court's discretion where it is also left under subdivision (c)(3) of the §1367 codification made in 1990.

The "supplemental jurisdiction" doctrine that supported jurisdiction at the outset does not automatically dissolve when the main claim drops out it is deemed to continue offering its jurisdictional support posthumously if the court finds it fair on the facts to go ahead with the remaining claims. Or, if the court finds otherwise, it can, in a case begun in the federal court, dismiss the remaining claims without prejudice or, in a removed case, remand the remaining claims to the state court.

When a case has been removed and the defendants then seek to substitute a party who would destroy diversity, a set of procedural issues arises. Subdivision (e), new in §1447, addresses the subject, giving the court only two options: (1) deny the motion, or (2) grant it and remand the case.

If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. "Shall" is the verb used the matter is not discretionary.

1447(e) states: "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case."

Provisions of §§1447, 1446 of this title must be strictly construed and their established procedures rigidly adhered to, and in a case where the basis for jurisdiction is doubtful, court should resolve such doubt in favor of remand. Removal jurisdiction must be strictly construed, both because federal courts are courts of limited jurisdiction and because removal of case implicates significant federalism concerns.

Federal court's removal jurisdiction derives solely from Congressional authorization, and removal statutes are construed strictly against removal. Where court is in doubt, motion to remand to state court should be granted.

The Fifth Circuit ruled in favor of remand with regard to amendments enacted after filing in re Shell Oil Co., C.A.5 (Tex.) 1991, 932 F.2d 1523, rehearing denied 940 F.2d 1532. Amendment to statute providing for remand if case was removed improvidently and without jurisdiction, to allow remand "for lack of subject matter jurisdiction", which was enacted after filing and removal of some of cases consolidated after removal, was procedural and thus could be applied to pending litigation.

The Fifth Circuit also supporting remand in Belser v. St. Paul Fire and Marine Ins. Co., C.A.5 (La.) 1992, 965 F.2d 5, the Court ruled: Although the Judicial Improvements Access to Justice Act was a procedural law, it would not be retroactively applied to invalidate a motion to remand that was valid when filed the matter was a mere private case between the parties, the plaintiff's right to remand became mature and unconditional when he timely filed motion to remand, and the change in the law would utterly deprive plaintiff of his right to remand and thus would work an injustice.

While the Tenth Circuit in re Bear River Drainage District, C.A.10 (Utah) 1959, 267 F.2d 849, ruled in favor of remand as follows:

> "Where, after removal from state court of suit against the United States, district court was confronted by motion by United States to dismiss on ground of sovereign immunity and by motion to remand, better practice would have been to rule first on motion to remand and, if granted, to have sent motion to dismiss back to state court".

Here the Ninth Circuit is in direct conflict with the Tenth Circuit. As Alexis De Tocqueville aptly put the point, "One of the most ordinary weaknesses of the human intellect is to seek to

reconcile contrary principles, and to purchase peace at the expense of logic". It holds that logic would dictate that the proper action, as to whom there was no subject matter jurisdiction in a removed case, was to remand claims against that defendant to state court rather than to dismiss that defendant.

This Court on the question of state law stated regarding remand in: International Primate Protection League v. Administrators of Tulane Educational Fund, U.S.La.1991, 111 S.Ct. 1700, 500 U.S. 72, 114 L.Ed.2d 134,.held: "Once it was determined that National Institutes of Health (NIH) lacked authority to remove action challenging treatment of monkeys used in federally funded medical experiments to federal court, remand to state court was required, despite NIH's claim that remand would be futile, since action would be required to be dismissed if NIH were retained as defendant, or would be removed if NIH officer was substituted as defendant; whether either NIH or one of its officers was indispensable party turned on question of state law".

The Eighth Circuit concerning hearings by lower court in re Business Men's Assur. Co. of America, C.A.8 (Mo.) 1993, 992 F.2d 181, ruled: "District court did not abuse its discretion in failing to conduct evidentiary hearing on its own motion to resolve doubts about federal question jurisdiction defendant, as party seeking removal and opposing remand, had burden of establishing jurisdiction, district court was required to resolve all doubts in favor of remand, and defendant did not request evidentiary hearing".

It is established law that motion for remand effectively forces party who invoked federal court's removal jurisdiction to prove whatever is necessary to support petition, e.g., existence of diversity, amount in controversy, or federal nature of claim. The removing party bears the burden of establishing jurisdiction of the federal court, and if doubts remain as to the right of removal, case should be remanded. The party who sought removal bears burden of establishing district court's subject matter jurisdiction upon

motion to remand for lack of such jurisdiction. When confronted with motion to remand, party who removed action from state court has burden of establishing propriety of removal and bears burden of establishing that case is within federal court's removal jurisdiction. It has always been held that party seeking to preserve a removal, not party moving for remand to state court, has burden of showing that requirements for removal have been met. As Adlai Stevenson once said, "It is often easier to fight for principles than to live up to them."

When district court lacks jurisdiction over any claim in action removed from state court, court's removal jurisdiction over entire action is defeated, thus warranting remand of entire case. It would be improper for court to address motion to dismiss if court lacks subject matter jurisdiction. In determining whether a removed civil action should be remanded due to lack of subject matter jurisdiction, any doubt should be resolved in favor of remand. If case is improperly removed because original jurisdiction was lacking, case must be remanded to state court from which it was removed and case must be remanded as first order of business where state court has jurisdiction but federal court lacks both original and removal jurisdiction.

It is established law that where possibility exists that there may be a later determination that district court lacks jurisdiction of action removed from state court, and that, even after trial and judgment, a remand might be ordered, caution recommends that in an uncertain or close case early remand to state court, where jurisdiction unquestionably lies, would be preferred procedure. The question to be resolved on motion for remand of case removed to federal court is whether district court had jurisdiction of the action. Where want of federal jurisdiction would make futile litigation of any of the issues in United States district court, every doubt should be resolved in favor of remand to state court.

The Eighth Circuit held in First Nat. Bank of Salem v. Wright, C.A.8 (Mo.) 1985, 775 F.2d 245, that: "If federal court determines

that no federal jurisdiction exists, it must remand case back to state court".

The Fifth Circuit held in Warren G. Kleban Engineering Corp. v. Caldwell, C.A.5 (Miss.) 1974, 490 F.2d 800, that: "The Courts of Appeals have continuing duty to inquire into the basis of jurisdiction in the district court and to satisfy themselves that the district court properly had jurisdiction to entertain action".

The Second Circuit held in Encoder Communications, Inc. v. Telegen, Inc., C.A.2 (N.Y.) 1981, 654 F.2d 198, that: "Where plaintiff was New York resident, cause of action upon which plaintiff depended for subject-matter jurisdiction in federal court was complaint charging conspiracy among all defendants to interfere with plaintiffs' contractual rights, and "all of defendants" included two New York residents, no federal jurisdiction existed and dismissal or remand of plaintiff's case to state court was required".

The First Circuit held in Sweeney v. Westvaco Co., C.A.1 (Mass.) 1991, 926 F.2d 29, certiorari denied 112 S.Ct. 274, 502 U.S. 899, 116 L.Ed.2d 226, that:

> "Appellate court possesses power to dismiss nondiverse parties in order to maintain jurisdiction in action removed to federal court, notwithstanding argument that removal statute provides that case which is removed to federal jurisdiction "shall be remanded" when it appears that district court lacks subject matter jurisdiction. Congress added mandatory word 'shall' for unrelated purpose of making clear that court must remand, not dismiss, removed suit that it lacked power to hear, and nothing in legislative history reflects any intent to deprive courts of authority to apply other potentially applicable rules of procedure".

Robert Bolt reflected, "We speak of being anchored to our principles. But if the weather turns nasty you up with an anchor and let it down where there's less wind, and the fishing's better".

BASIS FOR FEDERAL JURISDICTION IN THE FIRST INSTANCE

The district court had jurisdiction as a civil action arising under the laws of the United States pursuant to 28 U.S.C.S. § 1442(a)(1).

REASONS FOR GRANTING THE WRIT

I. The petition should be granted because of the many decisions which conflict between the memorandum below and other circuit court decisions regarding federal removal statute.

II. The petition should be granted because this case presents the important issue of equal justice under the law being denied and because a most basic right, the right to obtain justice arising from certain remedy in the laws for all injuries or wrongs.

SUMMARY OF ARGUMENT

Argument I, addresses the Constitutional issue of the Judicial Power extending to all cases in law and equity under Article III, and full faith and credit of judicial proceedings of every state under Article IV. Argument I, also addresses the Constitutional issue of due process and equal protection of the laws under the Fifth Amendment and the court's lack of subject matter jurisdiction under the Eleventh Amendment. Argument II addresses the Removal Statute.

ARGUMENT I

The lower court should not as governed under Article III, Article IV, the Fifth Amendment and the Eleventh Amendment of the Constitution involved itself in the abstract or in hypothetical situations when there was clearly no real dispute between FINNEGAN and the United States (IRS) and therefore no subject matter jurisdiction for the lower court. This issue is addressed squarely on point in the Fourth Circuit in Roach v. West Virginia

Regional Jail and Correctional Facility Authority, C.A.4 (W.Va.) 1996, 74 F.3d 46, when it ruled:

> "Fact that, had district court remanded to state court federal civil rights action brought by former employee against state jail authority which had been removed, state court would have most likely concluded that jail authority was not "person" within meaning of federal civil rights statute did not warrant affirmance of district court's erroneous decision to dismiss, rather than remand, action after determining that Eleventh Amendment barred district court from exercising jurisdiction; district court could not rule on merits due to lack of jurisdiction, futility of remand did not provide exception to mandatory remand under removal statute, and dismissal would not dispose of state law claims".

Federal courts have duty to examine whether jurisdiction is proper in a case, even if not raised by the parties, has independent responsibility to make sure that it does not act without jurisdiction and to continually re-examine basis for its jurisdiction over a case after it has been removed from state court.

State court in which action was originally brought could not acquire jurisdiction over subject matter with respect to United States when the government had not waived its sovereign immunity, but FINNEGAN did not bring actions against the United States. The lower court to which action was removed also was without jurisdiction and government would not be permitted to intervene to give the court jurisdiction when there was no jurisdictional foundation upon which court could act as governed by the Eleventh Amendment of the Constitution.

ARGUMENT II

The issue of Removal Statutes on point in the instant case were addressed by this Court in Westfall v. Erwin, 484 U.S. 292, 98 L Ed2d 619, 108 S Ct. 580. On appeal, the United States Court of

Appeals for the Eleventh Circuit reversed, expressing the view that:

> "(1) the District Court erred as a matter of law in applying only one part of the correct immunity test—whether the act was within the scope of the officials' duties—without also determining whether the challenged conduct was discretionary; and (2) the warehouseman and his wife had alleged undisputed facts sufficient to create a material question whether the officials complained-of acts were discretionary, so that summary judgement was inappropriate (785 F2d 1551)".

On certiorari, the United States Supreme Court affirmed. In an opinion by Justice Marshall, expressing the unanimous view of the Court, it was held that:

> "(1) federal officials are not absolutely immune from state-law tort liability for conduct within the scope of their employment, without regard to whether the challenged conduct was discretionary in nature; (2) absolute immunity for nondiscretionary functions finds no support in the traditional justifications for official immunity; (3) absolute official immunity from state law tort liability does not attach simply because the precise conduct of a federal official is not prescribed by law, and thus requires more than the exercise of minimal discretion; and (4) in the case at hand, a material issue of fact, sufficient to preclude summary judgement, existed as to whether the federal officials in question exercised sufficient discretion in connection with the alleged tort to warrant the shield of absolute immunity".

CONCLUSION

The Preamble of the Code of Judicial Ethics requires no less than the Constitutional issue of due process and equal protection of the laws under the Fifth and Fourteenth Amendments and the

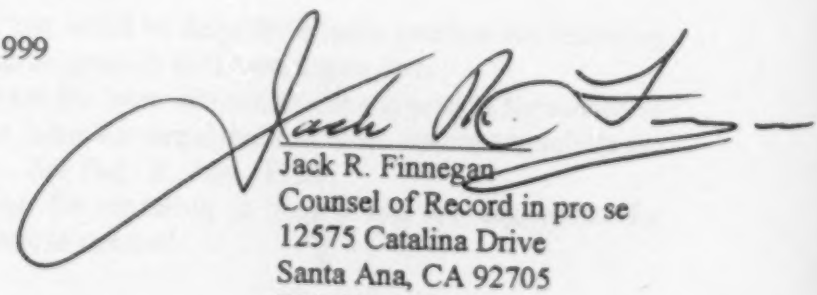
court's lack of subject matter jurisdiction under the Eleventh Amendment, when it states:

> "Our legal system is based on the principle that an independent, fair, and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to this code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible member of government under the rule of law."

Wherefore, it is respectfully submitted that the judgement of the court below should be reversed and the cause remanded to California Superior Court for trial on merit.

Respectfully submitted

May 14, 1999



Jack R. Finnegan
Counsel of Record in pro se
12575 Catalina Drive
Santa Ana, CA 92705
714-544-3247

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 17, 1998.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 97-56656 and DC#: CV-97-00583-GLT

JACK R. FINNEGAN,

Plaintiff - Appellant,

v.

MONTE KRUSE; KURT M. BENSWORTH,

Defendants - Appellees.

ORDER

Before: O'SCANNLAIN, FERNANDEZ, and TASHIMA, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

A true copy:
Teste:

Clerk of the United States Court
of Appeals for the Ninth Circuit

APPENDIX B — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED SEPTEMBER 22, 1998.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 97-56656 and DC#: CV-97-00583-GLT

JACK R. FINNEGAN,

Plaintiff - Appellant,

v.

MONTE KRUSE; KURT M. BENSWORTH,

Defendants - Appellees.

MEMORANDUM[1]

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Submitted September 14, 1998[2]

Before: O'SCANNLAIN, FERNANDEZ, and TASHIMA, Circuit Judges.

Jack R. Finnegan appeals pro se the dismissal of his action

---

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4

seeking damages for fraud, negligence, conspiracy, conversion, and intentional infliction of emotional distress allegedly committed by two Internal Revenue Service employees, Monte Kruse and Kurt Bensworth, during their examination of his 1991 tax return. The district court substituted the United States' as defendant and dismissed the action for failure to state a claim. Finnegan contends that the action was improperly removed from California state court, and that the district court erred by denying his recusal motion. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Finnegan contends that the district court erred by denying his motion to remand the case to state court because he did not plead any federal cause of action, and so there was no federal jurisdiction. This contention lacks merit because federal officers sued in state court for actions taken under color of their offices may remove the action to federal court if they raise a colorable federal defense. *See* 28 U.S.C. § 1442(a)(1); *Mesa v. California*, 489 U.S. 121, 129 (1989). Finnegan's complaint conceded that "[a]t all times herein mentioned," Kruse and Bensworth "were performing the conduct alleged herein as part and parcel of their official duties for the Internal Revenue Service." In their notice of removal, the defendants asserted the defense of sovereign immunity. *See Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985) (suit against IRS employees in their official capacity is essentially suit against United States, and so express statutory consent to sue is required); 28 U.S.C. § 2680(c) (precluding claims under Federal Tort Claims Act in respect to assessment or collection of tax).

Finnegan also contends that because he contested whether the defendants acted under color of their offices and whether their immunity defense was colorable, the district court erred by failing to hold an evidentiary hearing on his motion for remand. In his motion for remand, he argued that under California law, the defendants' acts were ministerial rather than discretionary, and they

therefore were not immune from suit. He also argued that the defendants acted outside the color of their offices when Bensworth took Finnegan's tax file home with him and when Kruse allegedly made false statements. The defendants were required only to show that their relationship to Finnegan derived solely from their official duties and that their defense was colorable; they were not required to win the case in order to have it removed. *See Willingham v. Morgan*, 395 U.S. 402, 407, 409 (1969); *Swett v. Schenk*, 792 F.2d 1447, 1450 (9th Cir. 1986) (purpose of removal statute is to ensure federal forum for evaluation of federal official's defense arising out of official duties). Accordingly, the district court did not err in denying Finnegan's motion for remand.

The district court also did not err in denying Finnegan's recusal motion, which was based solely on the court's rulings against him. *See United States v. Hernandez*, 109 F.3d 1450, 1454 (9th Cir. 1997) (per curiam).

AFFIRMED.

A true copy:
Teste:

Clerk of the United States Court
of Appeals for the Ninth Circuit

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, ENTERED OCTOBER 6, 1997.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Case No. SA CV 583-GLT

JACK R. FINNEGAN,

Plaintiff,

v.

MONTE KRUSE; et al.

Defendants.

ORDER

Plaintiff's Application to Withdraw the Preliminary Injunction is GRANTED. Plaintiff's Motion for Reconsideration of the Denial of the Motion for Remand is DENIED. Plaintiff's Motion for Rule 11 Corrections is DENIED.

Defendants' Motion to Substitute the United States as Defendant is GRANTED. Defendants' Motion to Dismiss the Action is GRANTED.

Discussion

I. Withdraw of the Preliminary Injunction

Since plaintiff is moving to withdraw his application for a preliminary injunction, the motion is GRANTED.

II. Reconsideration of the Denial of the Motion for Remand

Local Rule 7.16 provides a party may make a motion for reconsideration only on the grounds of (a) a material difference in fact or law from that previously presented to the Court, the existence of which was not knowable by a reasonably diligent plaintiff, (b) the emergence of new facts or a change in the law, or (3) a manifest showing of a failure by the Court to consider material facts in its original decision.

Although Plaintiff's motion for reconsideration alleges new facts, none materially affect this court's prior decision. The basis of the complaint remains that defendants, while acting within the scope of their official duties as IRS agents, violated plaintiff's rights. Therefore, removal to this court was proper. See 28 U.S.C. § 1442; Arizona v. Manypenny, 451 U.S. 232, 241-42 (1981). The motion for reconsideration is DENIED.

III. Motion for Rule 11 Corrections

Under FRCP Rule 11, the attorney's signature on the removal notice certifies that to the best of person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances the matters stated therein are supportable in fact and law. Thus, an attorney is subject to sanctions for removing an action without an objectively reasonable basis for doing so. 28 U.S.C. § 1446(a); Rockwell Int'l Credit Corp. v. United States Aircraft Ins., 823 F.2d 302 (9th Cir. 1987).

However, since removal was proper, defendants' attorney had a reasonable basis for removing the action. Therefore, there is no need for defendants to file corrected pleadings. Plaintiff's motion for Rule 11 corrections is DENIED.

IV. Motion to Substitute the United States as Defendant

Plaintiff's complaint alleges wrongful action by the defendants in their capacity as IRS agents. Although agents Kruse and Bensworth are named as individual defendants, the court is

required to construe the complaint as a claim against the United States. Gilbert v;DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985); Hutchinson v. United States, 677 F.2d 1325, 1327 (9th Cir. 1982). As a complaint against the United States, there is no subject matter jurisdiction over the individual defendants. Accordingly, the court must substitute the United States as the true party defendant.[1] The motion to substitute the United States as defendant is GRANTED.

V. Motion to Dismiss

Individuals may not sue the United States without its consent. United States v. Dalm, 494 U.S. 596 (1990). Plaintiff's naming of two individual employees of the IRS, rather than the United States, does not preclude the application of the sovereign immunity doctrine. Hawaii v. Gordon, 373 U.S. 57 (1963). The bar of sovereign immunity extends to agents and officers of the United States to the extent individuals sue them in their official capacities. Spalding v. Vilas, 161 U.S. 483 (1896); Gilhert v. DaGrossa, 756 F.2d 1455 (9th Cir. 1985).

The Federal Tort Claims Act (FTCA), 28 U.S.C. 2671, et seq., "contains a limited waiver of the federal government's sovereign immunity." However, the FTCA expressly excludes "any claim arising in respect to the assessment or collection of any tax . . . It 28 U.S.C. § 2680(c). Here, the plaintiff's complaint arises solely from the activities related to the collection of assessed taxes.

Therefore, the plaintiff's claim falls within the statutory exception to FTCA and fails to state a cognizable claim for relief.

---

[1] Even if the court could construe plaintiff's claim as an action against agents Kruse and Bensworth, the complaint fails to state a claim upon which relief. can be granted. The Ninth Circuit does not recognize a Bivens cause of action against government employees if the allegedly wrongful conduct is within the scope of their duties and Congress has prescribed a statutory remedy. In Wages v. IRS, 915 F.2d 1230 (9th Cir. 1990), the court explained since Congress has provided a remedy (a tax refund suit) for improper audit and collection activities, no Bivens action would lie. Id. at 1235; see also, Bivens v. six Unknown Federal Narcotics Agents, 403 U.S. 388 (1991).

Plaintiff could eventually seek relief under 28 U.S.C. § 7433, but it is premature to bring this claim in district court. Section 7433 allows a taxpayer to bring a civil action against the United States for damages arising from reckless or intentional violation of the IRS Code or Regulations by IRS officers or employees. 28 U.S.C. § 7433(a). The conduct alleged by plaintiff as the basis for his complaint (reckless or intentional disregard of the Internal Revenue Code or Regulations by agents or employees of the IRS), falls directly within the purview of § 7433.

However, the statute requires a plaintiff to exhaust administrative remedies before suing in district court. 26 U.S.C. § 7433(d)(3). Treasury Regulation § 301.7433-1(d) provides:

> (1) Except as provided in paragraph (d)(2) of this section, no action... shall be maintained in any federal district court before the earlier of the following dates:
>
> (I) The date the decision is rendered on a claim filed in accordance with paragraph (e) of this section; or
>
> (ii) The date six months after the date an administrative claim is filed in accordance with paragraph (e) of this section.
>
> (2) If an administrative claim is filed in accordance with paragraph (e) of this section during the last six months of the period of limitations described in paragraph (g) of this section, the taxpayer may file an action in federal district court any time after the administrative claim is filed and before the expiration of the period of limitations.

26 C.F.R. § 301.7433-1(d) (1992). Therefore, since plaintiff has not exhausted his administrative remedies, any § 7433 claim would be premature.

For the foregoing reasons', defendant's motion to dismiss is GRANTED.

Disposition

Plaintiff's Application for Withdraw of the Preliminary Injunction is GRANTED. Plaintiff's Motion for Reconsideration of the Denial of the Motion for Remand is DENIED. Plaintiff's Motion for Rule 11 Corrections is DENIED.

Defendants' Motion to Substitute the United States as Defendant is GRANTED. Defendants' Motion to Dismiss the Action is GRANTED.

DATED: 10/6/97

"S/ _____
GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA SOUTHERN DIVISION ENTERED OCTOBER 3, 1997.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Case No. SA CV 583-GLT

JACK R. FINNEGAN,

Plaintiff,

v.

MONTE KRUSE; et al.

Defendants.

ORDER DENYING MOTION TO DISQUALIFY JUDGE

On September 19, 1997, plaintiff filed an "Affidavit."

On September 23, 1997, the Affidavit was construed as a motion to recuse Jud4e Gary L. Taylor. On October 2, 1997, the matter was assigned to the undersigned judge pursuant to General Order 224.

If the Affidavit is construed in support of a motion to disqualify, it appears that plaintiff is alleging that Judge Taylor demonstrated 'severe prejudice for plaintiff" in the Court's Order of September 5, 1997, which, according to plaintiff, resulted in the continuance of a preliminary injunction application.

The injunction must have pertained to plaintiff's contesting federal jurisdiction, since he cites to statutes and cases discussing remand. He also includes with the Affidavit his proposed "Opposition to Defendants' Motion to Substitute the United States as Defendant and To Dismiss Action."

The motion is denied. Plaintiff brings his motion under Title 28 U.S.C. § 144 and requests that Judge Taylor "recluse" himself. A party must make a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice, and the judge shall then proceed no further and require assignment to another judge to hear the matter. However, the statute requires that "the affidavit shall state the facts and the reasons for the belief that bias or prejudice exists ... ". First, the order of which plaintiff complains was issued September 5, 1997; the filing of his Affidavit on September 19, 1997, is hardly timely. Assuming it to be timely and thus reaching the merits of the Affidavit, the Court concludes that the sum and substance of the plaintiff's ground for seeking to disqualify Judge Taylor is as summarized above: plaintiff's motion was improperly continued. Although the Affidavit must carry the motion, the Court takes judicial notice of the proceedings in this action to better understand the plaintiff's allegations. The September 5, 1997 order objected to by plaintiff resulted in postponing the hearing on plaintiff's application from September 22 to September 29, 1997. Lacking any specification of facts or reasons for plaintiff's alleged belief that prejudice against plaintiff prompted this ruling, the Court cannot grant the motion to disqualify and indeed no cause to do so has been shown.

CONCLUSION

For the foregoing reasons, the motion to disqualify is DENIED.

IT IS SO ORDERED.

The clerk shall serve a copy of this order on all parties forthwith.

DATED: October 3,1997.

"S/ _____
ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE